

78-1859

Supreme Court, U. S.

FILED

JUN 14 1979

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Numbers 78-1575
79-1162

GREY LINE AUTO PARTS, INC

Petitioner

v.

SAMUEL T. THARP, ERNEST
L. STRICKLAND, BRUCE H.
SNEAD, J. WAYNE DICKERSON,
and EARL H. SNEAD, INC.,
A Virginia Corporation

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

E. Brodnax Haskins
706 Mutual Building
Richmond, Virginia 23219

Counsel for Petitioner

and

W. Griffith Purcell
1012 Mutual Building
Richmond, Virginia 23219
Member of the Bar of this Court

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Grey Line Auto Parts, Inc. prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals For The Fourth Circuit entered in the above numbered cases, on April 19, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals is not published but attached hereto in Appendix Pages i - iii.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit was made and entered on April 19, 1979 and copies thereof are attached to this Petition in the Appendix Pages iv - v. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WERE THE RESPONDANTS EVER DAMAGED
BY THE PETITIONER?

The uncontradicted evidence of the trial of the action in the United States District Court revealed that Petitioner, Grey Line Auto Parts, Inc. placed every item of inventory into the initial business operation of the Respondant, Samuel T. Tharp. This stock in trade was utilized as the capital from which Tharp conducted his business by the repeated sale of these high volume items for a period of one year. Thereafter, Tharp never having paid for the initial inventory, received the entire stock in trade for another outlet for which he gave a token payment. Thereafter Tharp returned for full credit, over Thirty Thousand Dollars worth of inventory, more than he had received initially, and he still owed this Petitioner more than

Seventy Thousand Dollars on open account after the return of inventory and at the time of trial.

While the other Respondants made some payment for inventory received, when the amount of inventory received together with the amount of initial payment is balanced against the amount of inventory returned together with the amounts owed the petitioner on open account. The fact is demonstrated overwhelmingly that no Respondant here could have suffered damage at the hand of or by any act of the Petitioner.

SUBSIDIARY QUESTIONS INCLUDE:

1. Are damages presumed from the anti-trust violation?
2. If all reasonable men, exercising an unprejudicial judgment would draw the conclusion from the facts that the Respondants were not damaged, could they suffer damages?

STATUTE INVOLVED

The statute involved in this petition is 15 USC §15.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

This case concerns the effort of Grey Line Auto Parts, Inc., based upon the idea of its president, to meet the competition of national mass merchandisers, by furnishing capital via the placement of the stock in trade consisting of automobile parts, into the business of each of five persons. Contractual arrangements des-

cribed the placement of this inventory into each business without cost or with relatively little initial cost to any operator.

For a period of over one year, each operator received free use of the inventory to sell and replace each item without cost. In addition, each operator received limitless credit on open account upon the most liberal payment terms.

After utilizing this stock in trade for many months, these Respondents returned the inventory for full credit. In addition, these respondents each owed the Petitioner large sums of money for open account purchases which were never paid. Both the return of inventory and the open account balances were effected long before the cases were consolidated and tried.

Throughout the trial of the action and the appeal to the United States Court of Appeals for the Fourth Circuit, the Peti-

tioner urged the legal proposition that the Respondants herein could not possibly prove that they were damaged because damages cannot exist unless a loss occurs. In short, the Respondants were never damaged, they were benefited by the Petitioner.

The Respondants here brought action in the United States District Court for the Eastern District of Virginia for violation of the Sherman Act, (15 U.S.C. §15, previously recited). This furnished the basis for federal jurisdiction. All cases were consolidated and all judgments together with the separate judgments for counsel fees were consolidated for appeal. The judgments from the District Court total Two Hundred Forty Thousand Dollars (\$240,000.00).

REASON FOR ALLOWANCE OF THE WRIT

To prevent the undue tax upon the time of this Court, the Petitioner stands ready to abandon every assignment of error made at the trial and

in the Circuit Court except the question of whether the Respondants were ever damaged.

The Petitioner relies upon the previous rulings of this Court, especially in anti-trust cases, that the difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrongdoing defendant. However, this Court also holds that proof of the injury is always the plaintiff's burden.

The case of Story Parchment Co. v Paterson Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931) contains one point which approaches the point the Petitioner makes in this petition by the following language in 282 U.S. p. 562, 51 S.Ct. p. 250; 75 L.Ed. 544:

The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong not those damages which are definitely attributable to the wrong and

only uncertain in respect of their amount.

Another case which almost reaches the Petitioner's point here is Keogh v. Chicago & N.W.R. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183.

Under §7 of the Anti-trust Act...recovery cannot be had unless it is shown that as a result of defendants' acts, damages in some amount susceptible by expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable...

In sum, the Petitioner urges that its acts of putting the Respondants in business was not a restraint of trade but a promotion of trade. The terms upon which the stock in trade was placed in each business permitting the return for full credit of all inventory and to which right of return all Respondants availed themselves long before trial, receiving full credit for the returned merchandise; then such returns removed the possibility of any

legal damage or injury as a matter of law.

Petitioner believes that the facts recited herein are not subject to dispute, that no injury to the Respondents ever existed and that its failure to carry this point in the Fourth Circuit Court of Appeals is perplexing to it. It finds the point is so basic that argument is more difficult than upon more complex issues. It is fully aware that the opinion rendered in this case is normally not susceptible by review of this Court. Nevertheless, it respectfully submits that the United States Court of Appeals for the Fourth Circuit has decided this federal question in a way which conflicts with applicable decisions of this Court and further the Court of Appeals of the Fourth Circuit has rendered a decision in this case which is in conflict with another Court of Appeals on the same matter.

In World of Sleep v. Stearns and Foster Co., 525 F.2d 40 (10th Cir. 1975) on page 43 of the Report the following language appears.

It is well-established that an essential element for recovery under the anti-trust laws is that the claimant be injured or damaged and a violation of the act without resultant injury is not enough.

See Gray v. Shell Oil Company, 469 F.2d 742 (9th Cir. 1972), cert denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1972); Nationwide Auto Appraiser Serv. v. Association of C. & S., 382 F.2d 925. (10th Cir. 1967); and Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012 (9th Cir. 1965).

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

GREY LINE AUTO PARTS, INC.

By E. Brodman Haskins
Counsel

CERTIFICATE

I hereby certify that I have this 14th
of June, 1979, mailed 3 copies of the fore-
going Petition for Writ of Certiorari to
Charles F. Witthoefft, Esquire, Hirschler,
Fleischer, Weinberg, Cox and Allen, 2nd
Floor, Massey Building, 4 North 4th Street,
Richmond, Virginia 23219.

Edward Haslin

FILED

APR 19 1979

WILLIAM K. SLATE, II
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation,

Appellees,

-v-

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

No. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation,

Appellees,

-v-

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

Appeals from the United States District Court for the Eastern
District of Virginia, at Richmond. D. Dortch Warriner,
District Judge.

Argued April 3, 1979

Decided April 19, 1979

Before BUTZNER, WIDENER and HALL, Circuit Judges.

E. Brodnax Haskins (Wicker, Haskins and Hutchens on brief)
for appellant; Charles F. Witthoefft (Hirschler, Fleischer,
Weinberg, Cox & Allen on brief) for appellees.

PER CURIAM:

In this appeal of an action based on the Sherman Act, the issues concern the propriety of the damages awarded by the jury. The appellant concedes that it violated the Act, but it contends: (1) that the evidence establishes that the plaintiffs could not have suffered any damages; (2) that the amount of damages, if any, was too speculative and uncertain for proper jury determination; (3) that the damages should have been reduced in the amount of the reasonable value of certain services rendered by the defendant that allegedly benefited the plaintiffs; (4) that the defendant's exhibits did not conform to the pretrial order.

Upon consideration of the briefs, the record, and oral argument, we find no error warranting reversal. Consequently, we affirm the judgment for damages in No. 78-1575 and the award of attorney's fees in No. 79-1162.

JUDGMENT

United States Court of Appeals

for the
Fourth Circuit

No. 78-1575

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia Corporation,

Appellees.

vs.

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

Appeal from the United States District Court for the
District of Virginia.

Eastern

This cause came on to be heard on the record from the United States District
Court for the Eastern District of Virginia
, and was argued by counsel.

On consideration thereof, It is now here ordered and adjudged by this Court that
the judgment of the said District Court appealed from, in this cause, be, and the same
is hereby, affirmed.

FILED

APR 19 1979

WILLIAM X. SLATE, II
CLERK

William X. Slate, II
CLERK

JUDGMENT

United States Court of Appeals

for the
Fourth Circuit

No. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia Corporation,

Appellees.

vs.

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

Appeal from the United States District Court for the
District of Virginia.

This cause came on to be heard on the record from the United States District
Court for the Eastern District of Virginia
, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that
the judgment of the said District Court appealed from, in this cause, be, and the same
is hereby, affirmed.

FILED

APR 19 1979

WILLIAM K. SLATE, II
CLERK

William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS

FILED

FOR THE FOURTH CIRCUIT

MAY 31 1979

No. 78-1575

U. S. COURT OF APPEALS
FOURTH CIRCUIT

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia Corporation,

Appellees,

versus

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

Mo. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia Corporation,

Appellees,

versus

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant.

Appeals from the United States District Court for the Eastern
District of Virginia, at Richmond. D. Dortch Warriner, District
Judge.

Upon motion of the appellant, by counsel, and
for cause shown,

IT IS ORDERED that the mandate in the above-
entitled case be, and it is hereby, stayed for an additional
fifteen (15) days to and including June 14, 1979, pending
application of the appellant in the Supreme Court of the
United States for a writ of certiorari to this Court.

For the Court - by Direction.

William S. Spofford
CLERK

JUL 9 1979

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Number 78-1859

GREY LINE AUTO PARTS, INC.

Petitioner

v.

SAMUEL T. THARP, ERNEST
L. STRICKLAND, BRUCE H.
SNEAD, J. WAYNE DICKERSON,
and EARL H. SNEAD, INC.,
A Virginia Corporation

Respondents

SUPPLEMENTAL APPENDIX

E. Brodnax Haskins
706 Mutual Building
Richmond, Virginia 23219
and

W. Griffith Purcell
1012 Mutual Building
Richmond, Virginia 23219
A Member of the Bar of this Court

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UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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THE EASTERN DISTRICT OF VIRGINIA

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F I L E D
APR 19 1979
WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl
H. Snead, Inc., a Virginia
Corporation,

Appellees,

-v-

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant,

No. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation,

Appellees,

-v-

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant,

Appeals from the United States District
Court for the Eastern District of Virginia,
at Richmond. D. Dortch Warriner,
District Judge.

Argued April 3, 1979 Decided April 19, 1979

Before BUTZNER, WIDENER and HALL,
Circuit Judges,

E. Brodnax Haskins (Wicker, Haskins and
Hutchens on brief) for appellant; Charles
F. Witthoefft (Hirschler, Fleischer,
Weinberg, Cox & Allen on brief) for
appellees,

PER CURIAM:

In this appeal of an action based on the Sherman Act, the issues concern the propriety of the damages awarded by the jury. The appellant concedes that it violated the Act but it contends: (1) that the evidence establishes that the plaintiffs could not have suffered any damages; (2) that the amount of damages, if any, was too speculative and uncertain for proper jury determination; (3) that the damages should have been reduced in the amount of the reasonable value of certain services rendered by the defendant that allegedly benefited the plaintiffs; (4) that the defendant's exhibits did not conform to the pretrial order.

Upon consideration of the briefs, the record, and oral argument, we find

no error warranting reversal. Consequently, we affirm the judgment for damages in No. 78-1575 and the award of attorney's fees in No. 79-1162.

JUDGMENT

UNITED STATES COURT of APPEALS

for the

FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation,

Appellees,

vs.

Grey Line Auto Parts, Inc.,
a Virginia Corporation,

Appellant,

Appeal from the United States Dis-
trict Court for the Eastern District of
Virginia.

This cause came on to be heard on
the record from the United States Dis-
trict Court for the Eastern District of
Virginia, and was argued by counsel

On consideration whereof, It is now
here ordered and adjudged by this Court
that the judgment of the said District
Court appeals from, in this cause, be,

and the same is hereby, affirmed.

F I L E D

APR 19 1979

WILLIAM K. SLATE, II
CLERK

/s/ William K. Slate, II
CLERK

JUDGMENT

UNITED STATES COURT of APPEALS

for the

FOURTH CIRCUIT

No. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation, Appellees,

vs.

Grey Line Auto Parts, Inc.,
a Virginia Corporation, Appellant,

Appeal from the United States Dis-
trict Court for the Eastern District of
Virginia.

This cause came on to be heard on
the record from the United States Dis-
trict Court for the Eastern District of
Virginia, and was argued by counsel.

On consideration whereof, It is now
here ordered and adjudged by this Court
that the judgment of the said District
Court appealed from, in this cause, be,
and the same is hereby, affirmed.

FILED

APR 19 1979

WILLIAM K. SLATE, II

CLERK /s/ William K. Slate, II

CLERK

MAY 31 1979

U.S. COURT OF APPEALS
UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

FOR THE FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation, Appellees,

versus

Grey Line Auto Parts, Inc.,
a Virginia Corporation, Appellant,

No. 79-1162

Samuel T. Tharp, Ernest L.
Strickland, Bruce H. Snead,
J. Wayne Dickerson, and Earl H.
Snead, Inc., a Virginia
Corporation, Appellees,

versus

Grey Line Auto Parts, Inc.,
a Virginia Corporation, Appellant,

Appeals from the United States District
Court for the Eastern District of Virginia,
at Richmond. D. Dortch Warriner, District
Judge.

Upon motion of the appellant, by coun-
sel, and for cause shown,

IT IS ORDERED that the mandate in the
above-entitled case be, and it is hereby,
stayed for an additional fifteen (15) days
to and including June 14, 1979, pending
application of the appellant in the Supreme
Court of the United States for a writ of
certiorari to this Court.

For the Court - by Direction

/s/ William K. Slate, II
Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA-RICHMOND, DIVISION

SAMUEL T. THARP, ERNEST L. Civil Action File
STRICKLAND, BRUCE H. SNEAD, No. 77-0579-R
J. WAYNE DICKERSON, and
EARL H. SNEAD, INC., a
Virginia Corporation.

vs.

FILED
Judgment
Jun 6 1978

GREY LINE AUTO PARTS, INC., CLERK, U.S. DIST.
a Virginia Corporation COURT
RICHMOND, VA.

This action came on for trial before the Court and a jury, Honorable D. Dortch Warriner, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff, SAMUEL T. THARP recover of the defendant, GREY LINE AUTO PARTS, INC., the sum of ONE HUNDRED TWO THOUSAND AND NO/100 DOLLARS (\$102,000.00)

with interest thereon at the rate of
eight per cent (8%) per annum from this
date and his costs of this action and
reasonable attorney's fee's to be de-
termined by the Court.

Dated at Richmond,
Virginia, this 6th day
of June, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ David A. Ballas
David A. Ballas
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA-RICHMOND, DIVISION

SAMUEL T. THARP, ERNEST L. Civil Action File
STRICKLAND, BRUCE H. SNEAD, No. 77-0579-R
J. WAYNE DICKERSON, and
EARL H. SNEAD, INC., a
Virginia Corporation.

vs.

GREY LINE AUTO PARTS, INC., CLERK, U.S. DIST.
a Virginia Corporation COURT
RICHMOND, VA.

FILED
Judgment
Jun 6 1978

This action came on for trial before the
Court and a jury, Honorable D. Dortch
Warriner, United States District Judge,
presiding, and the issues having been
duly tried and the jury having duly ren-
dered its verdict.

It is Ordered and Adjudged that the plain-
tiff, ERNEST L. STRICKLAND, recover of
the defendant, GREY LINE AUTO PARTS, INC.,
the sum of FIFTEEN THOUSAND AND NO/100
DOLLARS (\$15,000.00)

with interest thereon at the rate of
eight per cent (8%) per annum from this
date and his costs of this action and
reasonable attorney's fee's to be de-
termined by the Court.

Dated at Richmond,
Virginia , this 6th day
of June, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ David A. Ballas
David A. Ballas
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA-RICHMOND, DIVISION

SAMUEL T. THARP, ERNEST L. Civil Action File
STRICKLAND, BRUCE H. SNEAD, No. 77-0579-R
J. WAYNE DICKERSON, and
EARL H. SNEAD, INC., a
Virginia Corporation.

vs.

FILED
Judgment
Jun 6 1978

GREY LINE AUTO PARTS, INC.,
a Virginia Corporation

CLERK, U.S. DIST.
COURT
RICHMOND, VA.

This action came on for trial before the
Court and a jury, Honorable D. Dortch
Warriner, United States District Judge,
presiding, and the issues having been
duly tried and the jury having duly ren-
dered its verdict.

It is Ordered and Adjudged that the plain-
tiff, BRUCE H. SNEAD, recover of
the defendant, GREY LINE AUTO PARTS, INC.,
the sum of TWENTY ONE THOUSAND AND NO/100
DOLLARS (\$21,000.00)

with interest thereon at the rate of
eight per cent (8%) per annum from this
date and his costs of this action and
reasonable attorney's fee's to be de-
termined by the Court.

Dated at Richmond,
Virginia, this 6th day
of June, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ David A. Ballas
David A. Ballas
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA-RICHMOND, DIVISION

SAMUEL T. THARP, ERNEST L. Civil Action File
STRICKLAND, BRUCE H. SNEAD, No. 77-0579-R
J. WAYNE DICKERSON, and
EARL H. SNEAD, INC., a
Virginia Corporation.

vs.

FILED
Judgment
Jun 6 1978

GREY LINE AUTO PARTS, INC., CLERK, U.S. DIST.
a Virginia Corporation COURT
RICHMOND, VA.

This action came on for trial before the Court and a jury, Honorable D. Dortch Warriner, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff, J. WAYNE DICKERSON, recover of the defendant, GREY LINE AUTO PARTS, INC., the sum of FOURTY TWO THOUSAND AND NO/100 DOLLARS (\$42,000.00)

with interest thereon at the rate of
eight per cent (8%) per annum from this
date and his costs of this action and
reasonable attorney's fee's to be de-
termined by the Court.

Dated at Richmond,
Virginia, this 6th day
of June, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ David A. Ballas
David A. Ballas
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA-RICHMOND, DIVISION

SAMUEL T. THARP, ERNEST L.
STRICKLAND, BRUCE H. SNEAD, Civil Action File
J. WAYNE DICKERSON, and No. 77-0579-R

EARL H. SNEAD, INC., a
Virginia Corporation.

vs.

FILED
Judgment
Jun 6, 1978

GREY LINE AUTO PARTS, INC., CLERK, U.S. DIST.
a Virginia Corporation COURT
RICHMOND, VA.

This action came on for trial before the Court and a jury, Honorable D. Dortch Warriner, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that the plaintiff, EARL H. SNEAD, INC., recover of the defendant, GREY LINE AUTO PARTS, INC., the sum of THIRTY THOUSAND AND NO/100 DOLLARS (\$30,000.00)

with interest thereon at the rate of
eight per cent (8%) per annum from this
date and his costs of this action and
reasonable attorney's fee's to be de-
termined by the Court.

Dated at Richmond,
Virginia , this 6th day
of June, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ David A. Ballas
David A. Ballas
Deputy Clerk

CERTIFICATE

I hereby certify that I have this
25th day of June, 1979, mailed 3 copies
of the foregoing Supplemental Appendix to
Charles F. Witthoefft, Esquire, Hirschler,
Fleischer, Weinberg, Cox and Allen, 2nd
Floor, Massey Building, 4 North 4th Street,
Richmond, Virginia 23219.

E. Brodcast Haster

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

NO.

79-1859

GREY LINE AUTO PARTS, INC.,
a Virginia corporation,

Petitioner,

v.

SAMUEL T. THARP, ERNEST L. STRICKLAND,
BRUCE H. SNEAD and EARL H. SNEAD, INC.,
a Virginia corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

CHARLES F. WITTHOEFT
Hirschler, Fleischer, Weinberg,
Cox & Allen
4 North 4th Street
P.O. Box 12085.
Richmond, Virginia 23241

Counsel for Respondents

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

NO.

GREY LINE AUTO PARTS, INC.,
a Virginia corporation,

Petitioner,

v.

SAMUEL T. THARP, ERNEST L. STRICKLAND,
BRUCE H. SNEAD and EARL H. SNEAD, INC.,
a Virginia corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondents, Samuel T. Tharp, *et al.*, respectfully pray that the Petition for Writ of Certiorari (hereinafter "the Petition") be denied and that they be awarded additional damages against Petitioner, pursuant to Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912, for their damages for delay caused by Petitioner in this appeal, and in support thereof set forth the following.

OPINIONS BELOW

The unpublished *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit, decided April 19, 1979, is appended to the Petition, pages i through iii. Among other contentions advanced by Petitioner in that court, the Fourth Circuit in affirming the judgments in the consolidated appeal specifically considered the same issue advanced in the Petition, i.e., whether "the evidence established that the (Respondents) could not have suffered any damages." (Petition, p. iii.) Petitioner did not move for a rehearing in the Fourth Circuit following that court's decision. No written opinion was delivered by the trial court, the United States District Court for the Eastern District of Virginia, Richmond Division (hereinafter "the District Court").

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Petitioner misstates certain facts, alleges other facts not in the record and fails to frame a clear legal issue for review. The issue which Petitioner appears to raise is whether there was sufficient evidence at trial to sustain the jury's verdict that Respondents were, in fact, injured in their businesses as a result of Petitioner's admitted price fixing practices in violation of § 1 of the Sherman Act (15 U.S.C. § 1).

Petitioner distorts completely, by what is described as

"uncontradicted evidence," the debtor-creditor business relationships of Respondents, as franchisees, and Petitioner, as franchisor. Contrary to Petitioner's suggestions, each Respondent purchased and paid for automobile parts, and was given nothing by Petitioner. The simplistic analysis of inventory "received," payments made and inventory returned, ignores totally Respondents' damage proof at trial—specifically, that as a result of Petitioner's price fixing of their purchases and resales of automobile parts, each of them received less income than they otherwise would have realized in their businesses.

Petitioner appears to challenge the decision below only to the extent that the Fourth Circuit affirmed that there was sufficient evidence in the record to support, as a matter of law, the jury's verdict that Petitioner's violations of the antitrust law caused damages to Respondents.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Again, Petitioner sets forth significant and numerous factual misstatements of the record, certain alleged facts not supported by the record, apparent conclusions of counsel, and statements irrelevant to the single issue presented for review. Significantly, not one "fact" asserted by Petitioner is referenced to any part of the record or to any trial exhibit. Moreover, Petitioner in its statement has disregarded the well-established rule of appellate review that the evidence on appeal is to be viewed most favorably to the prevailing party below, and all reasonable inferences from the evidence should be drawn in support of, and not against, the judgment appealed from. The Petition simply ignores any of Respondents' evidence on the damage causation issue.

By way of background, Respondents commenced the action against Petitioner to recover damages to their businesses resulting from price fixing by Petitioner on both Respondents' purchases and resales of automobile parts in the course of their operations as franchisees of Petitioner. It was stipulated by the parties at trial that Petitioner had engaged in price fixing as alleged, in violation of § 1 of the Sherman Act, and the only issues presented to the jury were: (i) whether Respondents were damaged as a result of Petitioner's price fixing; and, (ii) the amount of any such damages suffered by each of the Respondents. (R. 561, 563-65, 575-76.) The jury concluded that each Respondent had suffered injury as a result of Petitioner's illegal conduct and decided the amount of the damages suffered by each of them.¹ (R. 595-97.)

The District Court denied Petitioner's motion for judgment notwithstanding the verdict and on June 6, 1978 entered judgments in behalf of each Respondent against Petitioner pursuant to § 4 of the Clayton Act (15 U.S.C. § 15). The aggregate amount of Respondents' June 6, 1978 judgments totals \$168,000.00.

Thereafter, Respondents petitioned the District Court for determination of their reasonable attorney's fees and costs through the trial pursuant to § 4 of the Clayton Act. Based upon a stipulation by the parties as to the amounts, judgments were entered on January 11, 1979 in behalf of each of the Respondents in the aggregate amount of

¹In addition to Respondents Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead and Earl H. Snead, Inc., J. Wayne Dickerson was a plaintiff in the District Court, and also was awarded damages for Petitioner's price fixing in the same trial. Dickerson settled his claim with Petitioner during the pendency of the appeal of the judgments to the Fourth Circuit and is not a party to this appeal.

\$31,827.74, representing their attorney's fees and costs through the conclusion of the trial.

Petitioner appealed both sets of judgments in a consolidated appeal in the Fourth Circuit (No. 78-1575 and 79-1162). By its *per curiam* decision and judgments of April 19, 1979 the Fourth Circuit affirmed in all respects all judgments of the District Court. (Petition, p. i-v.)

At trial Respondents proved the fact of their damages by evidence of the difference between the fixed price and the market price, relating both to their purchases and resales of automobile parts. In particular, they demonstrated that they could have purchased automobile parts for *less* than they were forced to pay Petitioner had they been free to purchase such parts in the open market, and they demonstrated that they could have resold their automobile parts for *more* than the resale price fixed by Petitioner had they been free to resell their parts in the open market.

In support of the foregoing, it was stipulated by the parties that the Petitioner charged each of the Respondents the straight "jobber" price level for parts, without discount, while at the same time other automobile parts suppliers in the market area were extending an average volume discount of 8% off the "jobber" price in sales of the same parts to other jobber stores similar to those of Respondents. (Pl. Ex. 1, R. 54; R. 21-3.) The parties also stipulated that Petitioner forced Respondents to resell their automobile parts at the "stocking dealer" price level, a resale price level below the price at which Respondents' competitors normally resold their automobile parts. (Pl. Ex. 1, R. 54; R. 18-9, 23.) The stipulated facts alone support the conclusion that Respondents were damaged by Petitioner—that they could have purchased the same automobile parts from other sources for less than the "jobber" price fixed by Petitioner,

and could have resold their parts at prices greater than the "stocking dealer" price which Respondents were required by Petitioner to charge.

In addition to the stipulated facts, Respondents each testified from their actual business records that, after concluding their association with Petitioner and purchasing and reselling their parts on an unrestricted basis, they were able to actually purchase parts for less and to resell their parts for more. (Pl. Ex. 5,6,9,10,14,15,20,21; R. 60-7, 150-4, 212-8, 308-21.) The fixing of prices by Petitioner, therefore, caused damage to Respondents' businesses by actually requiring each of them to pay a higher price than the market price to purchase automobile parts, and by requiring them to resell their automobile parts for a lower price than the prevailing market resale price. This was a direct damage totally unaffected by the fact that each of the Respondents returned some limited portion of their inventory to Petitioner at the conclusion of their franchises.

Petitioner asserts that it "placed" inventory into Respondents' businesses "without cost" and provided them "free use" of automobile parts for resale on "limitless credit." None of these assertions are factual, supported by the record or by the unambiguous terms of the franchise documents. (Pl. Ex. 2,7,11,12 & 19.) It is evident from even a cursory examination of the subject franchise contracts that Petitioner gave the Respondents nothing. Instead, the parts were purchased with possession, title and risk of loss passing to Respondents. As evidenced by the amount of Respondents' damages caused by Petitioner's price fixing, a heavy price was exacted by Petitioner for the "privilege" of entering into one of its franchise contracts.

MOTION FOR DAMAGES FOR DELAY

Pursuant to Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912, Respondents move for damages against Petitioner, in addition to interest and their costs expended in this appeal, for the reason that this appeal of judgments for the payment of money is without merit and clearly appears to have been sued out merely for delay. Respondents move for damages in the amount of \$19,982.77, representing 10% of the principal amount of the June 6, 1978 and January 11, 1979 judgments of the District Court.

ARGUMENT

Petitioner seeks to have this Court review and reverse the Fourth Circuit's affirmation of the factual finding of the jury on the sole issue of causation of damages. There are no conflicting decisions on the legal principles relating to causation of damages under §4 of the Clayton Act, notwithstanding Petitioner's strained effort to demonstrate such a conflict.

A leading decision dealing with causation of damages for antitrust violations is *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L.Ed.544 (1931). In that case, involving a monopolism claim in violation of §2 of the Sherman Act, judgment for the plaintiff was rendered on the jury's verdict but that judgment was vacated and the case remanded by the First Circuit on essentially the same issue asserted by Petitioner in this appeal, specifically, that the plaintiff had not, as a matter of law, sustained the burden of proving that it had suffered

recoverable damage. This Court reversed the First Circuit and affirmed the trial court's judgment. The First Circuit had concluded that the plaintiff had failed to prove loss of value to its plant resulting from Sherman Act violations, but this Court noted, in reversing the Court of Appeals, that the First Circuit had drawn its own inferences from the facts presented, which inferences were "within the exclusive province of the jury, and which could not be drawn by the Court contrary to the verdict of the jury without usurping the functions of that fact finding body." 282 U.S. at 566, 75 L.Ed. at 550. Whether the plaintiff's damages were the proximate result of the defendant's unlawful conduct was a question of fact for the jury, and "the finding of the jury upon that question must be allowed to stand unless *all reasonable men*, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." 282 U.S. at 566, 75 L.Ed. at 550, emphasis added.

The later decision in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L.Ed. 652 (1946) also bears directly on the damage causation issue. In *Bigelow*, the plaintiffs were owners of a motion picture theatre who sued certain distributors of moving picture films alleging conspiratorial and discriminatory distribution of films which damaged their theatre and favored competing theatres. Based upon the jury's verdict for plaintiffs, judgment was rendered by the district court in their favor, but on appeal to the Seventh Circuit that judgment was reversed and final judgment was entered in the defendant's favor on the sole issue of the sufficiency of damage evidence. This Court reversed the Seventh Circuit, noting that "[t]he evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondent's action. . . ." 327 U.S. at 266, 90 L.Ed. at 661.

Significantly, the plaintiffs in *Bigelow* introduced two classes of evidence to prove their damages. 327 U.S. at 357-8, 90 L.Ed. at 657. The first was a comparison of plaintiffs' earnings with a competing, comparable theatre during the period in question. The second—similar to that of Respondents in the District Court—was a comparison of plaintiffs' receipts from their business operation before and after the unlawful actions of the defendants. On appeal to this Court the defendants argued that "the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of the damage," but in rejecting this argument this Court offered the following analysis:

The case in these respects is comparable to *Eastman Kodak Co. v. Southern Photo Materials Co.* 273 U.S. 359, 71 L.Ed. 684, 47 S. Ct. 400, and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 75 L.Ed. 544, 51 S. Ct. 248, in which precisely the same arguments now addressed to us were rejected. There as here, the suits were for damages caused by restraints imposed by defendants, in violation of the Sherman Antitrust Act, on the operation of the business of the complainant in each case. In the one case, the defendant, in an effort to extend its monopoly, refused to sell to the plaintiff goods which had regularly been a part of his stock in trade. In the other, the defendants, competing sellers, engaged in destructive price competition with the plaintiff in execution of an unlawful conspiracy. *In the first case, the plaintiff sought to establish his damage by comparing his profits before and after the unlawful interference with his business. In the other, the plaintiff sought to show his damage by proof of the difference between the amounts actually realized from his business after the conspiracy became effective, and what, but for the conspiracy, would have been realized by it from sales at reasonable prices, the*

evidence of which was the amount by which his current prices were higher before the conspiracy than after, and by the extent to which the value of plaintiff's business property had declined after the conspiracy had begun to operate.

In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of *just and reasonable inference* from the proof of defendants' wrongful acts and their *tendency to injure* plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs. In this we but followed a well settled principle. (327 U.S. at 263-4, 90 L.Ed. at 659-60, emphasis added.)

In an instance where a plaintiff's damages may have been attributable to more than one factor, the plaintiff need only prove that the defendant's unlawful conduct was a substantial cause of the damage, rather than the sole cause or even a cause more substantial than any other. *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 806 (1st Cir.), cert. denied, 379 U.S. 931, 85 S. Ct. 329, 13 L.Ed.2d 343 (1964). "[I]n a case where the damages cannot be precisely calculated because of the interaction of concurrent causes, there is no burden of excluding all other causes of loss, and. . . estimates based upon such evidence as is 'reasonably available' under the circumstances may be accepted." 333 F.2d at 806, n.16.

Respondents' proof as to the causation of the damages suffered by them in their businesses was consistent and straightforward. They proved the fact of their damages, in a method consistent with *Bigelow*, by showing the difference between the fixed price and the market price. As noted more

fully above, each of the Respondents proved, both through the stipulated facts and their testimony and exhibits, that their businesses were damaged because: (i) they could have purchased automobile parts for *less* than they were forced to pay Petitioner had they been free to purchase such parts on the open market; and, (ii) they could have resold their automobile parts for *more* than the resale price fixed by Petitioner had they been free to resell their parts in the open market. There is no reasonable doubt that if Respondents could have purchased automobile parts in the open market for less than the "jobber" price (the purchase price level fixed by Petitioner), they suffered direct damage and injury to their businesses by having to pay out more money to Petitioner to purchase such parts than they otherwise should have paid. So also, there is no reasonable doubt that if Respondents could have resold their automobile parts in an open market for more than the "stocking dealer" price (the resale price level fixed by Petitioner), they would have received more income than they actually did receive absent the resale price restraints imposed by Petitioner. The facts shown at trial, and the reasonable inferences drawn therefrom, fully support the jury's verdict finding that each of the Respondents suffered injuries caused by Petitioner's antitrust violation in these areas. Certainly, it can not be said that "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." *Story Parchment Co. v. Paterson Parchment Paper Co.*, *supra*, 282 U.S. at 566, 75 L.Ed. at 550.

With the exception of the *Story Parchment* decision, the decisions cited in the Petition have no relevance to this appeal. *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 43 S. Ct. 47, 67 L.Ed. 183 (1922) did not involve an action for

damages under §4 of the Clayton Act and dealt with preliminary motions on the pleadings, rather than a review of a jury verdict on the damage causation issue. Petitioner points to the fifth Circuit's decision in *World of Sleep v. Stearns & Foster Co.*, 525 F.2d 40 (10th Cir. 1975) and claims that this decision conflicts, in some undefined manner, with the law applied by the Fourth Circuit in the instant case. It is also contended, again without detail, that the decisions of this Court conflict with the law as applied by the Fourth Circuit. But Petitioner's argument fails for several reasons. First, it has never been Respondents' position, nor was it the holding of the Fourth Circuit, that Respondents could recover damages merely by proving a violation of the antitrust laws. As both the District Court and the Fourth Circuit agreed, Respondents offered sufficient evidence of the fact of their damages caused by Petitioner's conduct to support the jury's verdict. Second, the Fourth Circuit in its *per curiam* decision did not cite a single case or make any conclusions of law. How, then, can Petitioner claim in good faith that the *World of Sleep* decision conflicts with the Fourth Circuit's application of the law in this case? Third, as noted above in the references to *Story Parchment* and *Bigelow*, this Court's decisions on causation of damages under §4 of the Clayton Act are not in conflict, nor do they conflict with the decisions of the Fourth or Fifth Circuits.

Petitioner has failed to demonstrate that there are any legal issues presented by this case of sufficient importance to warrant the attention of this Court. The review requested by Petitioner would involve only questions of evidence applied under familiar, well-established legal principles. As is clear from its decision, the Fourth Circuit gave full and complete consideration to the damage causation issue and decided that issue correctly.

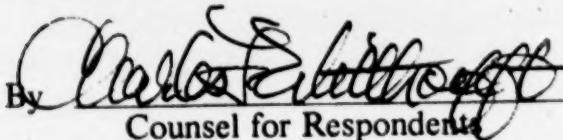
Rule 56 of the Rules of the United States Supreme Court and 28 U.S.C. §1912 (set out in the addendum hereto) are designed to compensate the prevailing party on appeal for damages resulting from delay in the instance of a frivolous appeal. See, e.g., *Slaker v. O'Connor*, 278 U.S. 188, 49 S. Ct. 158, 73 L.Ed. 258 (1929); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 43 S. Ct. 589, 67 L.Ed. 961 (1923); *Southern R. Co. v. Gadd*, 233 U.S. 572, 34 S. Ct. 696, 58 L.Ed. 1099 (1914). It is submitted that the appeal of a *per curiam* decision in which no conclusions of law are stated, the general unsubstantiated contentions of Petitioner, the total absence of any specific references to the record in support of the "facts" recited in the Petition, the serious and misleading misstatements of the terms of the franchise contracts between the parties to this appeal, the failure of Petitioner to make any reference to Respondents' damage proof relating to their purchases and resales, and the specious argument that there is a "conflict" in the application by the Fourth and Fifth Circuits of the law applicable to this appeal or a "conflict" between the decisions of this Court and the law applied by the Fourth Circuit on the damage causation issue, all lead to the conclusion that this appeal was brought, not in good faith or with any expectation of success, but to delay still further the payment of Respondents' damages resulting from Petitioner's illegal conduct. The Petition is an abuse of this Court, as well as damaging to Respondents, and it is submitted that an award of damages equal to 10% of the aggregate principal amounts of the June 6, 1978 and January 11, 1979 judgments is appropriate under Rule 56.

CONCLUSION

For the reasons stated above, Respondents ask that the Petition for Writ of Certiorari be denied and move that they be awarded damages for delay, in addition to interest on the judgments at the applicable rate, and their costs of this appeal.

Respectfully submitted,

SAMUEL T. THARP, ERNEST L.
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and EARL H. SNEAD, INC.

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ADDENDUM

Rule 56 of the Rules of the United States Supreme Court.

Interest and Damages.

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.
2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.
3. In cases in admiralty, damages and interest may be allowed only if specially directed by the Court.
4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

* * *

28 U.S.C. § 1912. Damages and costs of affirmance.

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.